SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0263-24

CAROL SMITH,

Plaintiff-Appellant,

v.

KONICA MINOLTA BUSINESS SOLUTIONS U.S.A., INC.,

Defendant-Respondent,

and

LISA GALLAGHER,

Defendant.

Submitted December 3, 2024 – Decided January 3, 2025

Before Judges Smith and Vanek.

On appeal from interlocutory orders of the Superior Court of New Jersey, Law Division, Union County, Docket No. L-1487-19.

Law Office of Daniel O. Sloan, LLC, attorney for appellant (Daniel O. Sloan, of counsel and on the brief).

Gibbons, PC, attorneys for respondents (Kristin D. Sostowski, Jennifer A. Hradil, and Zachary B. Posess, on the brief).

PER CURIAM

Plaintiff Carol Smith appeals June 17 and August 26, 2024 orders compelling the production of handwritten notes created by her psychiatric expert, Dr. Jay Kuris, M.D., and requiring plaintiff to pay Dr. Kuris's fees for a second deposition as a discovery sanction pursuant to Rule 4:23-5. Because the trial court did not abuse its discretion in finding Dr. Kuris's notes are discoverable under Rule 4:17-4 and sanctioning plaintiff for failing to comply with court orders compelling production, we affirm.

I.

We glean the salient facts from the motion record. Plaintiff's amended complaint demands damages from defendants Konica Minolta Business Solutions and Lisa Gallagher for violating the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14, among other causes of action, in connection with the termination of her employment. During the course of discovery, plaintiff's original psychiatric expert died, and plaintiff designated Dr. Kuris to succeed him.

Plaintiff served Dr. Kuris's expert report coupled with what was labeled as his "work file," comprised only of another doctor's records. None of the other materials required by Rule 4:17-4(e) were produced. Despite defendant's multiple requests, plaintiff failed to produce Dr. Kuris for a deposition or provide the remainder of the work file and expert disclosures. Although the discovery was subsequently compelled by court order, plaintiff still failed to comply.

We reversed the trial court's order granting summary judgment to defendants and remanded the litigation to the trial court for further proceedings.[1] On March 5, 2024, the trial court reopened discovery and again ordered plaintiff to produce complete expert disclosures. Plaintiff subsequently served additional expert disclosures with a representation that the production was complete.

During Dr. Kuris's deposition, defense counsel learned the doctor's work file included four pages of handwritten notes he created during plaintiff's 2022 psychiatric exam. Dr. Kuris testified that he was unaware of any request for his work file, nor did he recall producing its contents.

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[1] See Smith v. Konica Minolta Bus. Sols. U.S.A., Inc., No. A-1465-22 (App. Div. Oct. 19, 2023).

On motions filed by both parties, the trial court entered two June 17, 2024 orders, one of which compelled plaintiff to: produce Dr. Kuris's complete expert work file, including the handwritten notes; produce Dr. Kuris for a second deposition; and pay Dr. Kuris's fees associated with the second deposition. In an August 26, 2024 order, the trial court denied plaintiff's motion for reconsideration, which requested in-camera review of Dr. Kuris's notes "to confirm . . . they are not duplicative of the final report and to prevent the release of potentially privileged information."

We granted plaintiff leave to appeal.

II.

We discern no abuse of discretion, State v. Brown, 236 N.J. 497, 521 (2019), in the trial court's rulings and affirm substantially for the reasons set forth in the trial court's August 26, 2024 written decision, offering the following brief comments.

A.

"New Jersey's discovery rules are to be construed liberally in favor of broad pretrial discovery of all relevant evidence." Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J. Super. 1, 29 (App. Div. 2012) (citing Payton v. N.J. Tpk. Auth., 148 N.J. 524, 535 (1997)). "Although relevance creates a

presumption of discoverability, that presumption can be overcome by demonstrating the applicability of an evidentiary privilege." Ibid. (citing R. 4:10-2(a)).

We are unconvinced that Dr. Kuris's notes are precluded from discovery under any of the privileges referenced in plaintiff's merits briefs. The notes are not shielded from discovery under the attorney work product privilege based upon application of Rule 4:10-2(d). Attorney work product privilege, as it relates to experts, does not preclude facts and data considered by the expert in rendering the report. See R. 4:10-2(d)(1). Dr. Kuris testified that the handwritten notes only contain facts that he relied upon in preparing his report.

Pursuant to Dr. Kuris's deposition testimony, the notes also do not constitute preliminary or draft reports, and do not contain communications with plaintiff's attorney. Instead, Dr. Kuris created the notes while conducting his psychiatric exam of plaintiff, and he relied on those notes to draft his report. Thus, pursuant to Rule 4:17-4(e), Dr. Kuris's notes constitute part of his final report and are discoverable.

Dr. Kuris's notes are also not privileged under Rule 4:10-2(c), as documents created in anticipation of litigation. Dr. Kuris prepared the notes during his examination of plaintiff, while litigation was well underway.

According to Dr. Kuris's deposition testimony, the notes contain only facts that he relied upon in preparing his report. Since the undisputed facts in the record establish that the notes are not privileged documents protected from disclosure under Rule 4:10-2, the trial court did not abuse its discretion in deciding the motion without first conducting an in-camera review. See Loigman v. Kimmelman, 102 N.J. 98, 109 (1986) (reasoning when a generic claim of privilege is proffered, the court "lays the material against the exemption claimed to determine if the matter can be resolved without an in camera viewing").

We cannot consider any further argument regarding the substance of Dr. Kuris's notes, since they were not provided to us on appeal. Because plaintiff failed to apply to the trial court for a protective order pursuant to Rule 4:10-3,[2] we lack a record with which to review any belated assertions that affirmative relief should have been granted to plaintiff.

B.

[2] Rule 4:10-3 provides that a party may for good cause shown seek any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Lipsky v. N.J. Ass'n of Health Plans, Inc., 474 N.J. Super. 447, 466 (App. Div. 2023) (quoting R. 4:10-3).

The trial court did not abuse its discretion in finding Dr. Kuris's fees for the second deposition should be borne by plaintiff pursuant to Rule 4:23-5(b), which expressly authorizes "a court to sanction a party who has failed to furnish an expert's report." Salazar v. MKGC Design, 458 N.J. Super. 551, 561 (App. Div. 2019). Under Rule 4:23-2(b)(4), a trial court "shall require the party failing to obey [an] order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

The court's imposition of the obligation to pay Dr. Kuris's fees associated with the second deposition, was based on plaintiff's failure to provide the handwritten notes. The existence of the notes was revealed only at Dr. Kuris's first deposition, where the notes were not produced for counsel's review and witness questioning. Thus, the sanction imposed under Rule 4:23-5(b) was directly correlated to plaintiff's discovery deficiency since the failure to produce the previously court-ordered notes necessitates Dr. Kuris's second deposition.

Because we conclude that the entry of the June 17 order compelling production of Dr. Kuris's handwritten notes and sanctioning plaintiff for the

failure to produce the court-ordered documents was not an abuse of discretion, we affirm the trial court's denial of plaintiff's motion for reconsideration pursuant to Rule 4:42-2 as not warranting relief in the interests of justice. To the extent we have not addressed any of plaintiff's remaining arguments, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.