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THE APPROVAL OF THE COMMITTEE ON OPINIONS

REBECCA DECKER, Plaintiff, v. ETHICON, INC., ETHICON WOMEN'S HEALTH AND UROLOGY, a Division of Ethicon, Inc., GYNECARE, JOHNSON & JOHNSON, AND JOHN DOES 1-20, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – BERGEN COUNTY DOCKET NO. BER-L-15031-14 MASTER CASE NO. BER-L-11575-14 *CIVIL ACTION*

Submitted: September 17, 2015[1]
Decided: November 2, 2015

APPEARING:

For Plaintiff Rebecca Decker: Mitchell Breit, Esq. (Simmons Hanly Conroy, LLC)

For Defendants Ethicon, Inc., Ethicon Women's Health and Urology, a Division of Ethicon, Inc., Gynecare, and Johnson & Johnson: Kelly S. Crawford, Esq. and Brett M. Becker, Esq. (Riker Danzig, L.L.P.)

MARTINOTTI, J.S.C.

Before this Court is Plaintiff Rebecca Decker's ("Plaintiff") Motion to Reinstate her Complaint. This Motion is OPPOSED by Defendants Ethicon, Inc., Ethicon Women's Health and Urology, Gynecare, and Johnson & Johnson (collectively "Defendants").

[1] At the Case Management Conference on October 21, 2015, counsel agreed to have this matter heard without argument.

ARGUMENTS

Plaintiff's Motion to Reinstate Complaint

Plaintiff filed her Complaint on July 8, 2013. (Breit Cert. ¶ 2, Pl.'s Ex. A.) The Plaintiff Fact Sheet ("PFS") was due by October 12, 2013. (Crawford Cert. ¶ 4.) Plaintiff did not provide Defendants her PFS by the court-mandated deadline. (Breit Cert. ¶ 10.) On February 18, 2015, Defendants filed a Motion to Dismiss for Failure to Provide a PFS. (Crawford Cert.¶ 10.) This Court granted that Motion and issued an Order dismissing this case without prejudice on March 20, 2015. (Crawford Cert. Ex. A.) Plaintiff submitted a PFS to Defendants on September 16, 2015. (Breit Cert. ¶ 14.) As Plaintiff has now complied with the PFS requirement, she asks this Court to reinstate her Complaint. (Breit Cert. ¶ 14.)

Defendants' Opposition to Plaintiff's Motion to Reinstate

Defendants advance two arguments in opposition to Plaintiff's Motion. First, Defendants argue Plaintiff should be held to the "excusable neglect" or "exceptional circumstances" standards, as opposed to the "good cause" standard, because her Complaint would have been dismissed with prejudice but for the moratorium that the Hon. Carol E. Higbee, J.S.C. imposed on this case while she was being considered for the Appellate Division. Alternatively, Defendants argue that if the Court grants this Motion the reinstated Complaint should be deemed filed on the date of the order, in which case the claim would be time-barred.

1. Defendants' Argument Opposing Reinstatement

Defendants argue there were egregious delays in providing discovery (one year and seven months after the PFS was due) and in bringing the present Motion (five months after Plaintiff's Complaint was dismissed without prejudice). Pursuant to Rule 4:23-5(a)(2), after an order has been entered for failure to produce discovery, the party entitled to discovery may move for a

dismissal with prejudice. The dismissal "shall be granted" unless there is a motion to vacate the previous order and the delinquent party has produced the discovery, or if there are exceptional circumstances. R. 4:23-5(a)(2).

Defendants argue that, had Judge Higbee not imposed a moratorium on filing motions, Defendants would have been able to file their Motion to Dismiss Without Prejudice any time after April 11, 2014. Then, they could have filed the Motion to Dismiss with Prejudice after 60 days pursuant to Rule 4:23-5(a)(2). This timeframe would have allowed Defendants to obtain an order dismissing Plaintiff's Complaint with prejudice well before Plaintiff submitted her PFS on September 16, 2015.

Defendants argue that Plaintiff should be held to the "excusable neglect" or "exceptional circumstances" standards of Rule 4:50-1. See Pressler & Verniero, Current N.J. Court Rules, R. 4:50-1, cmt. 1.5 ("A party seeking relief under R. 4:50-1 from a dismissal or suppression with prejudice is required to be granted unless fully responsive answers have been served by the time of the return date or . . . extraordinary circumstances are demonstrated."). Defendants note that Plaintiff provides no justification for the delay, and argue further that the only subsections of Rule 4:50-1 that could apply to Plaintiff's circumstances are 4:50-1(a) ("mistake, inadvertence, surprise, or excusable neglect"), or 4:50-1(f) ("any other reason justifying relief from the operation of the judgment or order"). R. 4:50-1(a), (f). Excusable neglect is "'attributable to an honest mistake that is compatible with due diligence or reasonable prudence.'" U.S. Bank Nat'l Ass'n. v. Guillaume, 209 N.J. 449, 468 (2012) (quoting Mancini v. EDS, 132 N.J. 330, 335 (1993)). Defendants argue Plaintiff's nearly two-year delay in submitting the PFS does not meet this required standard. Further, the subsection (f) catchall does not apply, as Plaintiff has not provided any explanation for the late submission.

2. Defendants' Argument That a Reinstated Complaint Should Be Deemed Filed on the Date of the Order

If this Court grants Plaintiff's Motion to Reinstate, Defendants argue the Court should abrogate the relation back doctrine and deem Plaintiff's Complaint reinstated on the date of the order, not on the date of her original Complaint. Defendants cite Konopka v. Foster, 356 N.J. Super. 223 (App. Div. 2002), in which a plaintiff did not comply with statutory medical disclosure requirements for seeking noneconomic damages. The court ruled that even if the trial judge had erred by dismissing plaintiff's case with prejudice, rather than without prejudice, the error had no impact because "any restitution of suit [was] barred by the statute of limitations." Id. at 228.

Defendants argue abrogation of the relation back doctrine is necessary to ameliorate the prejudice they would otherwise suffer. Defendants note they have not been able to conduct discovery during the time the PFS was delinquent. If Plaintiff's Complaint is reinstated, Defendants state they will reenter the case at a time in which "memories have faded and medical records are likely more difficult to obtain." (Defs.' Opp. to Pl.'s Mòt. to Reinstate at 7).

Plaintiff's Reply to Defendants' Opposition

Plaintiff refutes Defendants' assertion that she would benefit from an administrative delay. She argues Defendants' assertion that, but for the moratorium, they would have moved successfully to dismiss this case with prejudice, is hypothetical. The dismissal without prejudice "sparked [Plaintiff's] wish to continue her case," and she asserts she would have submitted the PFS earlier if the dismissal without prejudice had taken place earlier. (Pl.'s Reply at 2.)

A dismissal with prejudice is a recourse of last resort, and it should not be invoked unless no lesser sanction is adequate. Tucci v. Tropicana Casino and Resort, Inc., 364 N.J. Super. 48,

52 (App. Div. 2003). Plaintiff argues any prejudice Defendants would experience if this Motion is granted is considerably less than the prejudice to Plaintiff if her case is dismissed with prejudice. The prejudice to Defendants is slight, particularly because this case has not been selected as a bellwether.

Finally, Plaintiff asks the Court to deny Defendants' request that the Complaint, if reinstated, be deemed filed on the date of the order. Granting Defendants' request would be akin to a dismissal with prejudice.

DECISION

Rule 4:23-5(a) states that if a party seeking to vacate a motion of dismissal does not file such motion within 90 days of entry of the order, "the court may also order the delinquent party to pay sanctions or attorney's fees and costs, or both, as a condition of restoration." Rule 4:23-5. However, New Jersey courts have held that failure to move to vacate dismissal within the prescribed time frame "does not by itself bar vacating the dismissal." Georgis v. Scarpa, 226 N.J. Super. 244, 251 (App. Div. 1988), citing Zaccardi v. Becker, 88 N.J. 245, 251 (1992). "The court has discretion to relax the 30-day limit to prevent injustice pursuant to Rule 1:1-2, or by the application of Rule 4:50-1(f), which permits the court to relieve a party from the operation of an order to achieve essential fairness." Georgis, supra, 226 N.J. Super. at 252 (citing Zaccardi 88 N.J. at 253 n.3; Schlosser v. Kragen, 111 N.J. Super. 337, 345-46 (Law Div. 1970); Hodgson v. Applegate, 31 N.J. 29, 43 (1959); Tenby Chase Apartments v. N.J. Water Co., 169 N.J. Super. 55, 59-60 (App. Div. 1979)).

> To determine whether the rules should be relaxed, several important factors should be considered by a trial court, including: (1) the extent of the delay; (2) the underlying reason or cause; (3) the fault of the litigant, and (4) the prejudice that would accrue to the other party. Jansson v. Fairleigh Dickinson University, 198 N.J. Super. 190, 195 (App. Div.1985). The decision to vacate an order pursuant

> to R. 4:23-5, requires a two-step analysis. The judge must first examine the case in light of the factors set forth in Jansson. Then he must determine whether the ultimate sanction of suppression or dismissal is appropriate or whether a less drastic sanction is more equitable in light of the circumstances of the case.

Ibid.

The first of Defendants' two arguments opposing Plaintiff's Motion is more persuasive. Plaintiff's counsel provides no explanation for the nearly two-year delay in submitting the PFS. (See Breit Cert.) The parties' papers suggest Plaintiff would not have filed the PFS in time to avoid dismissal with prejudice if not for the moratorium. In that respect, Plaintiff is reaping the benefit of a procedural delay over which Defendants had no control.

However, despite Defendants' argument about the unfairness or bad luck that they would experience because administrative delays prevented them from seeking dismissal of this case with prejudice, there is no basis in law to apply the "exceptional circumstances" standard here, rather than the "good cause" standard. Judge Higbee's moratorium did not stem from either party's actions, nor was it intended to benefit or punish either party. But the moratorium was a fact of the litigation. Given the unusual nature of this case's history in two different vicinages, it is understandable that Defendants have no legal precedent to support their claim that this Court should act as though the moratorium did not take place and assume that Defendants would have successfully moved to dismiss Plaintiff's case with prejudice. Applying the "exceptional circumstances" standard[2] to Plaintiff's Motion may be fair, but there is no law compelling that result. Plaintiff's Complaint was dismissed without prejudice.

Thus, the "good cause" standard should apply. Though Plaintiff's counsel provides little explanation for the untimeliness of the PFS submission, the standard is generous to plaintiffs and

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[2] Indeed, given this unique factual scenario, namely the large number of pending matters, not only in New Jersey but also nationwide, the transfer of cases from Atlantic County to Bergen County, and Judge Higbee's moratorium, one can posit the exceptional circumstances are present as a matter of law.

"the right to 'reinstatement is ordinarily routinely and freely granted when plaintiff has cured the problem that led to the dismissal even if the application is made many months later.'" Ghandi v. Cespedes, 390 N.J. Super. 193, 196 (App. Div. 2007) (quoting Rivera v. Atl. Coast Rehab. Center, 321 N.J. Super. 340, 346 (App. Div. 1999)). Here, Plaintiff cured the problem by submitting the PFS and under the "good cause" standard, reinstatement is appropriate.

Defendants' second argument—that Plaintiff's Complaint, if reinstated, should be deemed submitted on the date of the order—is less persuasive. Courts have consistently ruled a reinstated complaint relates back to the filing of the original complaint. See J. Roberts And Son, Inc. v. Hillcrest Memorial Co., 363 N.J. Super. 485, 491 (App. Div. 2005) ("Where a matter is reinstated, the action reverts to the status of the complaint as it existed at the time the dismissal was entered."). A reinstated complaint "does not trigger the statute of limitations even though the reinstatement occurs after the statute of limitations has run." Ibid. The relation back doctrine applies unless there is evidence that a plaintiff or plaintiff's counsel engaged in willful misconduct. Miles v. CCS Corp., 2015 N.J. Super. Unpub. LEXIS 1989, *12 (App. Div. 2015) (citing Czepas v. Schenk, 362 N.J. Super. 216, 225, 228 (App. Div. 2003)).

Here, there is no indication or allegation that Plaintiff or her counsel engaged in willful misconduct. The relation back doctrine should therefore apply. Under J. Roberts And Son, supra, there is no statute of limitations issue.

CONCLUSION

In light of the foregoing, Plaintiff's Motion to Reinstate is GRANTED.