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THE APPROVAL OF THE COMMITTEE ON OPINIONS

CINDY LYNN KAZMIERSKI, 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-15633-14 MASTER CASE NO. BER-L-11575-14 ***CIVIL ACTION***

Submitted: September 9, 2015[1]
Decided: November 2, 2015

APPEARING:

For Plaintiff Cindy Lynn Kazmierski: James D. Barger, Esq. (Aylstock, Witkin, Kreis & Overholtz, PLLC)

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 Cindy Lynn Kazmierski's ("Plaintiff") Motion to Vacate the Dismissal of her Complaint and to Reinstate the 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 Vacate Dismissal and Reinstate Complaint

Plaintiff filed her Complaint on December 13, 2013. Her Plaintiff Fact Sheet ("PFS") was due on January 27, 2014, but Plaintiff's counsel was unable to reach her by email, mail, or telephone despite several attempts. (Pl.'s Cert. ¶ 3.) Plaintiff's counsel sought PFS extensions from Defense counsel on February 26, 2015, March 19, 2015, and April 13, 2015, but Defense counsel did not respond. Ibid.

On March 20, 2015, this Court dismissed Plaintiff's Complaint without prejudice for failure to provide a PFS. On September 2, 2015, Plaintiff provided a completed PFS to Defendants. Plaintiff does not provide any reason for the delay other than counsel's inability to reach her.

Defendants' Opposition to Plaintiff's Motion to Reinstate the Complaint

Defendants advance two arguments in opposition to Plaintiff's Motion. First, Defendants argue Plaintiff should be held to the "exceptional circumstances" standard, as opposed to the "good cause" standard, because her Complaint would have been dismissed with prejudice but for the moratorium imposed when this case was filed in Atlantic County.[2] 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

[2] The Hon. Carol E. Higbee, J.S.C. imposed the moratorium while she was being considered for elevation to the Appellate Division.

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 November 21, 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 2, 2015.

Defendants argue that Plaintiff should be held to the "exceptional circumstances" showing of Rule 4:23-5(a)(2), not the "good cause" showing required to defeat a dismissal without prejudice under Rule 4:23-5(a)(1). If Plaintiff is held only to a showing of good cause, she will be permitted to benefit from the administrative delays that stemmed from the moratorium. Plaintiff cannot demonstrate exceptional circumstances, as the Appellate Division has held neither failure of the client to communicate with her attorney, nor administrative issues, nor a combination of the two constituted exceptional circumstances to defeat a motion to dismiss with prejudice pursuant to Rule 4:23-5(a)(2). See Rodriguez v. Luciano, 277 N.J. Super. 109 (App. Div. 1994), superseded by Rule on other grounds, R. 4:23-5(a)(2), as recognized in Adedoyin v. Arc of Morris Cnty. Chapter, Inc., 325 N.J. Super. 173, 182-83 (App. Div. 1999) (submission of fully responsive answers precludes dismissal).

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." Ibid. at 228.

Defendants argue abrogation of the relation back doctrine is necessary to ameliorate prejudice they would otherwise suffer. Defendants note they have not been able to conduct discovery in the time the PFS was delinquent. If Plaintiff's Complaint is reinstated, Defendants 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'Mot. to Reinstate at 7).

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. By Plaintiff's counsel's own admission, he had no contact with his client for a significant period of time before the PFS was due. (Pl.'s Cert., ¶ 3.) Plaintiff's counsel offers no explanation for this. 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[3] 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. Plaintiff's counsel provides little to no explanation for the untimeliness of the PFS submission. But the standard is generous to plaintiffs and "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. Furthermore, there is no prejudice to Defendants.

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. 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

[3] 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.

applies unless there is evidence that a plaintiff of 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. See J. Roberts And Son, supra, (there is no statute of limitations issue when a complaint is reinstated).

CONCLUSION

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