NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2382-19

JESSE WOLOSKY,

Plaintiff-Appellant,

v.

FREDON TOWNSHIP, and MICHAEL and PENNY HOLENSTEIN,

Defendants-Respondents.

APPROVED FOR PUBLICATION

June 2, 2022

APPELLATE DIVISION

Argued May 3, 2022 – Decided June 2, 2022

Before Judges Hoffman, Whipple and Geiger.

On appeal from the Tax Court of New Jersey, Docket No. 8267-2016, whose opinion is reported at Wolosky v. Fredon Twp., 31 N.J. Tax 373 (Tax 2019).

Walter M. Luers argued the cause for appellant (Cohn, Lifland, Pearlman, Herrmann & Knopf, attorneys; Walter M. Luers, on the briefs).

Robert B. McBriar argued the cause for respondent Fredon Township (Schenck, Price, Smith & King, LLP, attorneys; William E. Hinkes, on the brief).

Tara Ann St. Angelo argued the cause for respondents Michael and Penny Holenstein (Gebhardt & Kiefer, PC, attorneys; Kelly A. Lichtenstein and Tara Ann St. Angelo, on the brief).

John R. Lloyd argued the cause for amicus curiae Association of Municipal Assessors of New Jersey (Chiesa Shahinian & Giantomasi, PC, attorneys; John R. Lloyd, on the brief).

The opinion of the court was delivered by

HOFFMAN, P.J.A.D.

Plaintiff Jesse Wolosky appeals from an order of the Tax Court awarding Green Township, pursuant to the frivolous litigation statute, N.J.S.A. 2A:15-59.1, "$45,589.35 in counsel fees and costs for its defense of [defendant Penny] Holenstein"[1] in her official capacity as Municipal Tax Assessor. Wolosky v. Fredon Twp., 31 N.J. Tax 373, 405 (Tax 2019). Because the motion for sanctions was untimely, we vacate the award of sanctions in favor of Green Township.

Plaintiff also appeals from an order denying his motion for counsel fees against defendant Fredon Township. Because the record does not support a finding that Fredon Township acted frivolously, we affirm the denial of plaintiff's motion for sanctions.

[1] We refer to Penny Holenstein individually as Holenstein, and refer to Michael and Penny Holenstein, collectively, as the Holensteins.

I.

As a resident of Sussex County, plaintiff sought to increase the tax assessment of the Holensteins' single-family residence located in Fredon Township. To bring about this increase, on March 30, 2016, plaintiff filed a petition of appeal with the Sussex County Board of Taxation (the Board), challenging the assessment[2] of the Holensteins' residence for the 2016 tax year. The Board dismissed the appeal without prejudice, citing a perceived conflict presented by the fact that Holenstein served as the Municipal Tax Assessor for three Sussex County municipalities: the Townships of Green, Byram, and Stillwater.

On May 12, 2016, plaintiff timely appealed to the Tax Court, pursuant to N.J.S.A. 54:51A-1, again seeking to increase the assessment on the Holensteins' residence. In his complaint, plaintiff alleged he was "aggrieved and discriminated against by the assessed valuation of [Holensteins'] property." The Holensteins filed an answer[3] asserting six affirmative defenses, including failure

[2] In 2009 and 2010, Fredon Township assessed the Holensteins' residence at $544,400; in 2011, the assessment decreased to $506,300; in 2012, the assessment decreased to $437,600 and remained at that figure through 2016.

[3] Green Township agreed to provide for the defense of Holenstein, determining that plaintiff instituted the action against her "as a result of her official duties" as Tax Assessor for the township.

to state a claim upon which relief can be granted; in addition, they alleged that plaintiff's complaint was "baseless and asserted solely for improper purposes," warranting the imposition of sanctions.

On June 2, 2016, Holensteins' counsel sent plaintiff a letter, advising him that his tax appeal was frivolous and filed with an intent to harass. The letter also advised that the Holensteins would seek sanctions and attorneys' fees if plaintiff did not withdraw the tax appeal within twenty-eight days.

When plaintiff failed to withdraw his appeal, defendants filed a motion to dismiss. During oral argument on the motion, the trial court called plaintiff to the witness stand to give sworn testimony concerning his basis for filing the subject tax appeal. After plaintiff testified, the court ruled the motion premature, explaining the tax appeal would not be frivolous if plaintiff overcomes the presumption of validity,[4] "regardless of . . .his motivations."

[4] "Original assessments . . . are entitled to a presumption of validity." MSGW Real Est. Fund, LLC v. Borough of Mountain Lakes, 18 N.J. Tax 364, 373 (Tax 1998). "Based on this presumption, the appealing taxpayer has the burden of proving that the assessment is erroneous." Pantasote Co. v. City of Passaic, 100 N.J. 408, 413 (1985) (citing Riverview Gardens v. N. Arlington Borough, 9 N.J. 167, 174 (1952)). A taxpayer can only rebut the presumption by introducing "competent evidence" of true value; that is, evidence "definite, positive and certain in quality and quantity to overcome the presumption." Aetna Life Ins. Co. v. Newark City, 10 N.J. 99, 105 (1952) (citing Central R.R. Co. of N.J. v. State Tax Dep't, 112 N.J.L. 5, 8 (E. & A. 1933)).

Defendants made clear their intention to seek reimbursement for all counsel fees incurred if plaintiff failed to overcome the presumption. While acknowledging that plaintiff "stands to lose quite a bit" because of "the allegations of revenge and vendetta," the court explained,

> It is not a frivolous case if [plaintiff] survives the motion to dismiss but . . . in the end[,] doesn't prevail.
>
> [I]t's really only a frivolous case if [plaintiff] produces no evidence at all to survive the [c]ourt going to value. But [if] the [c]ourt can go to value, he could survive the motion. The court could go to value and rule against him. So[,] under those circumstances[,] I don't think it's a frivolous case.
>
> But if [plaintiff] doesn't meet the first step to overcome the presumption[,] then I think we'll be talking about a frivolous case and what evidence points to that . . . .

On September 2, 2016, the court denied the Holensteins' motion to dismiss, without prejudice. Thereafter, the court entered an order permitting plaintiff to inspect the Holensteins' residence, within certain parameters.

The matter proceeded to trial on December 9, 2016, with plaintiff presenting expert Matthew Nemeth[5] as his only witness. We summarized

[5] The parties stipulated to Nemeth's qualifications as a New Jersey certified residential real estate appraiser, and the court accepted him as an expert.

Nemeth's testimony in our opinion denying an earlier appeal filed by plaintiff in this matter, after the trial court dismissed his complaint:

> According to Nemeth, the subject property, located on a cul-de-sac, contains 6.26 acres of land and a single-family colonial house with four bedrooms, three and one-half baths, an attached three-car garage, a porch, a balcony, an in-ground pool, and a shed. Nemeth described the house as average quality in good condition. Nemeth utilized a sales comparison approach and concluded to a reasonable degree of certainty that the value of the subject property was $535,000.
>
> To acquire data regarding comparable sales, Nemeth relied on the websites of the New Jersey Association of Tax Boards, New Jersey Property Fax, and Multiple Listing Service (MLS). He did not confirm any data with the buyer, seller, broker or attorney involved in the transactions he utilized as comparable sales. He also did not access the deeds, sale documents, or property record cards for any of the comparable properties, nor did he physically inspect any of the comparable properties.
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> [Wolosky v. Fredon Twp., No. A-1980-16 (App. Div. July 24, 2018) (slip op. at 2-3) (Wolosky I)]

After Nemeth testified, plaintiff rested; at that point, defendants renewed their motion to dismiss, arguing that Nemeth's testimony failed to overcome the presumption of correctness. The trial court granted the motion, ruling that plaintiff failed to overcome the presumption of validity of the challenged assessment and dismissed plaintiff's case with prejudice. Specifically, the court

found that Nemeth relied "on multiple listing service as a sole source of data" and failed to "support any of his adjustments with any objective data put before this Court." The court noted that Nemeth presented evidence of a difference of 378-square feet, or "[r]oughly a good size room." However, to accept the value proposed by Nemeth of $535,000 would mean that the "the difference of one good-sized room equates to $100,000 in value," which the court found was "not believable . . . not credible."

As for plaintiff's "motives in bringing this suit" and the award of sanctions and costs, the court stated it would need to "schedule a hearing . . . in the future to determine whether something like sanctions or costs are appropriate in this case." Importantly, the court advised "both sides to look at the rules that pertain to frivolous suits, to be sure that we comply with those."

Before the hearing ended, the trial court reconsidered its plan to schedule a hearing to address the issue of frivolous litigation sanctions, explaining that "any hearing in that regard" is not "appropriate until the plaintiff decides whether to appeal this decision and the [a]ppellate [c]ourt[s] decide[] whether or not they agree or disagree" with the decision to dismiss plaintiff's case. Notably, the court did not address the conflict between its revised plan, which deferred the issue of frivolous litigation sanctions until plaintiff exhausted all appeals, with the mandatory time limitation imposed by Rule 1:4-8(b)(2), which

instructs that "[a] motion for sanctions shall be filed with the court no later than [twenty] days following the entry of final judgment."

On December 9, 2016, the court entered judgment dismissing plaintiff's case with prejudice; thereafter, plaintiff filed a timely appeal of the judgment. While the appeal remained pending, plaintiff filed tax appeals challenging the assessment on the Holensteins' residence for the years 2017 and 2018.[6] On July 24, 2018, we affirmed the dismissal of the 2016 complaint based on plaintiff's failure to present sufficient evidence to overcome the presumption of correctness. Wolosky I, slip op. at 10. The issue of sanctions and whether the complaint was frivolous at the time of the filing was not presented in the appeal.

On October 18, 2018, the Holensteins filed a motion for sanctions under Rule 1:4-8(b). Plaintiff filed a cross-motion to disqualify the trial judge and for attorneys' fees. On October 19, 2018, Fredon Township also filed a motion for sanctions.

[6] By letter dated July 6, 2017, counsel for the Holensteins advised plaintiff that his 2017 tax appeal was frivolous and filed with an intent to a harass, especially considering the dismissal of his 2016 tax appeal. The letter advised that the Holensteins would seek sanctions and attorneys' fees if the appeal was not withdrawn within twenty-eight days. On April 16, 2018, counsel for the Holensteins sent plaintiff a similar letter concerning his 2018 tax appeal. Plaintiff eventually dismissed the 2017 and 2018 complaints, but not within twenty-eight days of receiving the letters.

On October 19, 2018, the trial court entered two orders[7] to reopen the case to address defendants' motions for post-judgment relief. The order recounted the procedural history of the case, specifically that the matter was dismissed with prejudice by judgment dated December 9, 2016, that the bench opinion "reserve[ed] the future right to seek post[-]judgment relief" after any appeals, that the decision was then affirmed on appeal, and that defendants were given until October 19, 2018, to decide whether to seek post-judgment relief.

On March 18, 2019, the trial court denied plaintiff's disqualification motion. The trial court then scheduled a hearing on the motions for sanctions for August 12, 2019. At the hearing, the court heard testimony from the Holensteins and Cindy Church, the Deputy Clerk of Byram Township, in support of the motions. In opposition, plaintiff presented his own testimony, along with deposition testimony of his former counsel, who no longer lived in New Jersey.

In a published decision dated December 18, 2019, the trial court concluded the complaints filed by plaintiff "to raise the 2016, 2017, and 2018 local property tax assessments on the Holensteins' single-family residence were frivolous within the meaning of [Rule] 1:4-8 and N.J.S.A. 2A:15-59.1, and that

[7] The first order included only Fredon Township's motion for sanctions. The second order added the Holensteins' motion for sanctions.

at all times [plaintiff] acted in bad faith." Wolosky, 31 N.J. Tax at 406-07.[8] The court awarded counsel fees and costs in the amount of $45,589.35 to reimburse Green Township "for its defense of Mrs. Holenstein in her official capacity as Municipal Tax Assessor." Id. at 407. However, the court denied Fredon Township's motion for reimbursement of fees and costs because Fredon Township failed to send plaintiff a "safe harbor"[9] letter, and thus failed to "meet the procedural requirements of [Rule] 1:4-8." Ibid.

This appeal followed, with plaintiff asserting the following arguments:

> Point I
>
> The Trial Court Abused Its Discretion by Extending the Time to File a Motion for Sanctions by 679 Days After Entry of Final Judgment.
>
> Point II
>
> The Trial Court Erred by Not Recusing Itself.

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[8] The trial court concluded that plaintiff's "appeal to raise the local property tax assessment on the Holensteins' single-family residence was a frivolous suit[,] a premeditated act of vengeance against . . . Holenstein for not giving him what he wanted in the settlement of his own property tax appeal." Id. at 394-95. The court described the evidence of plaintiff's "premeditation and malice in filing this suit" as "overwhelming." Id. at 395.

[9] The "safe harbor" provision in Rule 1:4-8 is designed to give those engaged in frivolous litigation prompt warning of the risk of sanctions and the opportunity to take remedial action. Toll Bros., Inc. v. Twp. of W. Windsor, 190 N.J. 61, 72 (2007).

Point III

The Trial Court Erred in Awarding Fees and Sanctions Under N.J.S.A. 2A:15-59.1(a)(2).

Point IV

Plaintiff's Tax Appeal Complaint Was Not Frivolous.

Point V

The Frivolous Litigation Statute and Request for Sanctions and Counsel Fees Is Preempted by N.J.S.A. 54:51A-22.

Point VI

Alternatively, the Trial Court Should Not Have Awarded Counsel Fees for the Time Spent by Counsel Prior to the Denial of Defendants' Motion to Dismiss and After the Entry [o]f Final Judgment, and for Work Performed Before the Appellate Division or Before the Sussex County Board of Taxation.

Point VII

The Trial Court's Imposition of Sanctions was in an Amount Greater Than Required to Deter the Filing or Pursuit of Frivolous Litigation.

Point VIII

The Court Erred in Not Awarding Plaintiff Counsel Fees Against Fredon for Fredon's Filing of a Motion for Sanctions Without Ever Having Served a Safe Harbor Letter.

Because we vacate the order for sanctions based upon plaintiff's first point of argument, we need not address the remaining issues raised by plaintiff, except for Point VIII, which challenges the denial of plaintiff's motion for sanctions against Fredon Township. We address the denial of plaintiff's motion for sanctions in Part III of this opinion.

II.

Our Supreme Court recently reaffirmed its "general policy in favor of 'restrained appellate review of issues relating to matters still before the trial court' to avoid piecemeal litigation." Harris v. City of Newark, 250 N.J. 294, 312 (2022) (quoting Moon v. Warren Haven Nursing Home, 182 N.J. 507, 510 (2005)); accord Vitanza v. James, 397 N.J. Super. 516, 518 (App. Div. 2008) (noting the "strong policy against piecemeal review and interruption of the orderly processing of cases to disposition in the trial courts.") As Justice Brennan explained almost seventy years ago, a "limitation of interlocutory review to 'certain specified unusual situations,' State v. Lefante, 14 N.J. 584, 591 (1954), makes for more orderly and efficient determination of the ultimate merits of any controversy with consequent greater realization of right and just results." Trecartin v. Mahony-Troast Constr. Co., 21 N.J. 1, 6 (1956).

A party may file an appeal as of right from a final judgment. R. 2:2-3(a). If an order is not a final judgment, appeal is available only by a motion to the

Appellate Division for leave to appeal under Rules 2:2-4 and 2:5-6(a). Janicky v. Point Bay Fuel, Inc., 396 N.J. Super. 545, 550 (App. Div. 2007). "To be a final judgment, an order generally must dispose of all claims against all parties." Vitanza, 397 N.J. Super. at 518 (quoting Janicky, 396 N.J. Super. at 549-50) (internal quotation marks omitted). We have repeatedly admonished trial courts and attorneys not to circumvent our jurisdictional rules to file an appeal from orders that are not final judgments, without our leave. See, e.g., Grow Co. v. Chokshi, 403 N.J. Super. 443, 461 (App. Div. 2008); Vitanza, 397 N.J. Super. at 518-19; Janicky, 396 N.J. Super. at 551-52.

We review the trial judge's decision on a motion for frivolous lawsuit sanctions under an abuse of discretion standard. McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 498 (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 amounts to a clear error in judgment.'" Ibid. (quoting Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005)).

Sanctions for frivolous litigation against a party are governed by the frivolous litigation statute, N.J.S.A. 2A:15-59.1. See also R. 1:4-8 (authorizing similar fee-shifting consequences as to frivolous litigation conduct by attorneys). N.J.S.A. 2A:15-59.1 and Rule 1:4-8 provide limited exceptions to

the "American Rule" for civil justice, whereby litigants are expected to bear their own counsel fees. Our courts traditionally have adhered strictly to the American Rule because "sound judicial administration will best be advanced by having each litigant bear his own counsel fees." First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 425 (App. Div. 2007) (quoting Gerhardt v. Cont'l Ins. Co., 48 N.J. 291, 301 (1966)). As a consequence, we have approached fee-shifting requests under the Frivolous Litigation Statute and Rule 1:4-8 restrictively, because "the right of access to the court should not be unduly infringed upon, honest and creative advocacy should not be discouraged, and the salutary policy of the litigants bearing, in the main, their own litigation costs, should not be abandoned." Gooch v. Choice Entertaining Corp., 355 N.J. Super. 14, 18 (App. Div. 2002) (quoting Iannone v. McHale, 245 N.J. Super. 17, 28 (App. Div. 1990)).

Additionally, to ensure Rule 1:4-8 does not become another routine method for awarding attorneys' fees, "the Rule imposes a temporal limitation on any fee award, holding that reasonable fees may be awarded only from that point in the litigation at which it becomes clear that the action is frivolous." LoBiondo v. Schwartz, 199 N.J. 62, 99 (2008) (citing DeBrango v. Summit Bancorp, 328 N.J. Super. 219, 229-30, (App. Div. 2000)); see also United Hearts, LLC v. Zahabian, 407 N.J. Super. 379, 394 (App. Div. 2009) (reversing sanctions

against an attorney where the trial court allowed case to survive summary judgment and proceed to trial, thus precluding findings of frivolous pleading or bad-faith litigation).

Subsection (f) of Rule 1:4-8, titled "Applicability to Parties," provides that "[t]o the extent practicable, the procedures prescribed by this rule shall apply to the assertion of costs and fees against a party other than a pro se party pursuant to N.J.S.A. 2A:15-59.1." Thus, a litigant moving for counsel fees and costs pursuant to N.J.S.A. 2A:15-59.1 is required to comply with Rule 1:4-8(b)(1)'s safe harbor provision, but only "[t]o the extent practicable." R. 1:4-8(f).

A pleading is "frivolous" if:

> 1) The complaint, counterclaim, cross-claim or defense was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or
>
> 2) The non-prevailing party knew, or should have known, that the complaint, counterclaim, cross-claim or defense 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)-(2).]

Just like Rule 1:4-8, the frivolous litigation statute is interpreted restrictively. DeBrango, 328 N.J. Super. at 226. Sanctions should be awarded

only in exceptional cases. Fagas v. Scott, 251 N.J. Super. 169, 181 (Law Div. 1991).

In Point I of his brief, plaintiff argues that the trial court abused its discretion in extending the time to file a motion for sanctions 679 days after the entry of final judgment. He cites several cases[10] strictly enforcing Rule 1:4-8(b)(2), requiring a motion for sanctions shall be filed with the court no later than twenty days after the entry of judgment, and argues that the trial court does not have "unlimited power to toll the mandatory twenty-day deadlines to file a motion for sanctions."

Because judgment in this case was entered on December 9, 2016, and the motion for sanctions was not filed until October 19, 2018, plaintiff contends that the court erred in "relaxing the time period to file by nearly two years." Plaintiff also notes that the Holensteins certified in their case information statement (CIS)

[10] See Czura v. Siegel, 296 N.J. Super. 187 (App. Div. 1997) (affirming the denial of a motion for sanctions as untimely where the motion was filed 228 days after entry of judgment); Venner v. Allstate, 306 N.J. Super. 106, 113 (App. Div. 1997) (reversing a counsel fee award as untimely where the underlying matter was dismissed on March 22, 1996, and a motion for fees was not filed until August 1996); Trocki Plastic Surgery Ctr. v. Bartkowski, 344 N.J. Super. 399, 405 (App. Div. 2001) (reversing a counsel fee award where motion for sanctions filed almost six months after judgment); In re Farnkopf, 363 N.J. Super. 382, 397 (App. Div. 2003) (finding a counsel fee award time-barred where motion for fees was not filed until four months after dismissal).

filed with this court in Wolosky I that there were no claims that had not been disposed of, including counsel fees. Plaintiff further argues that the trial court never actually issued an order tolling the timeline and that defendants did not file their motion until eighty-seven days after this court issued its decision in Wolosky I.

The Holensteins respond that they "made their intent to file such a motion clear from the beginning of the action," that the delay in the filing of the motion for sanctions was only because the trial court "intentionally placed it on hold pending a disposition on appeal," and that they were "following the court's explicit instructions." The Holensteins cite no legal precedent supporting their position; instead, they argue that they filed their motion entirely within the timeframe established by the trial court without delay. They contend that the cases cited by plaintiff are distinguishable because none of them involved a situation where the filing deadline for a fee application was "tolled by the [trial] court."

We are not persuaded by defendants' arguments. Because we conclude the trial court inappropriately failed to address the issue of sanctions at the conclusion of the trial, and because we conclude that the Holensteins waived the issue at the time of the first appeal from the judgment dismissing plaintiff's tax

appeal, we are constrained to vacate the order granting the Holensteins' motion for attorneys' fees.

We reject the Holensteins' argument that the trial court comments following the trial effectively stayed or bifurcated the issue of sanctions, notwithstanding the absence of an order providing for a stay or bifurcation. During argument at the hearing on January 25, 2019, the trial court stated that it had "stayed the 20-day period" and that "[i]t was the [c]ourt's action that has dictated what the other parties will do here and when these motions would be filed." The court noted that it had decided to stay the motion until the appellate courts ruled on the decision to dismiss the complaint; thus, to accept the argument now that the motion was untimely would penalize the parties for the court's mistake. The court then stated that it would "stand by the decision [it] made." Notably, at this hearing, the court did not assert that it had bifurcated the issue, under Rule 4:38-2, following the conclusion of the trial.

Almost three months later, the trial court amplified its decision for considering defendants' motions for sanctions as timely filed. In an April 17, 2019 letter to counsel, the court explained that the initial motions to dismiss plaintiff's complaint as frivolous were denied; however, after the matter proceeded to trial, defendants successfully moved to dismiss based on lack of evidence at the close of plaintiff's proofs. The court then noted that "[d]uring

the trial, the court determined to stay the proceeding for a motion to impose frivolous litigation sanctions on Mr. Wolosky until either [plaintiff's] time period to file an appeal had been exhausted or the Appellate Division rendered a final decision." When plaintiff did not apply for certification to our Supreme Court after this court issued Wolosky I on July 24, 2018, the trial court scheduled a conference and set a deadline of October 19, 2018, for the filing of motions for sanctions and fees.

The Holensteins and Fredon Township filed motions for sanctions and fees within the timeframe set by the court and the court ruled those motions were timely filed. The court explained that the twenty-day time limitation in Rule 1:4-8(b)(2) had been tolled "because the court ordered a separate hearing and stay of proceeding for the issue of sanctions on the bench on December 9, 2016." The court provided a long quote from that hearing as support for its claim; however, the quoted language does not indicate the court issued a stay, only that the court did not "think any hearing . . . regard[ing sanctions was] appropriate until the plaintiff decide[d] whether to appeal this decision and the [a]ppellate [c]ourt[s] decide[d] whether or not they agree[d] or disagree[d] with [the court's] decision . . . ."

In fact, it was not until the April 17, 2019 amplification letter that the trial court mentioned bifurcation, under Rule 4:38-2, asserting that "[t]he court's

bench order was appropriate and within the sound discretion of the court" under that rule, "for the convenience of the parties or to avoid prejudice." The court explained that it "ordered a separate hearing to address the issues of sanctions after the final determination by the Appellate Division," citing case law that a claim will be deemed frivolous "when it is completely untenable." (emphasis added) (quoting Belfer v. Merling, 322 N.J. Super. 124, 144 (App. Div. 1999)). Relying on Belfer, the court reasoned that it was in the "best interest" of both sides to postpone the hearing on a motion for sanctions until plaintiff's claim against the Holensteins became "completely untenable."

We disagree. We reject the trial court's reasoning because the appeal filed by plaintiff was not to determine whether the complaint was frivolous when filed, but rather, whether the court erred in dismissing the complaint at the close of plaintiff's proofs because he failed to overcome the presumption of correctness. The trial court did discuss the need for a separate hearing on the issue of sanctions at the time of its dismissal of plaintiff's case, but it did not, in fact, issue a stay or an order bifurcating the issue of frivolous litigation sanctions. Nor did defendants timely move for such relief following the entry of judgment.

We also find the trial court placed undue emphasis on the term "completely untenable" in Belfer, a case involving a dispute among family

members of a closely held corporation. Id. at 130. Following a lengthy trial, the General Equity judge found against the plaintiff and awarded partial counsel fees to one of the defendants. Id. at 131. On appeal, we concluded that no counsel fees should have been awarded and vacated the judgment. Ibid. Because the Belfer trial judge addressed the issue of counsel fees before entering final judgment, albeit mistakenly, the parties, the trial court, and this court all avoided the unnecessary expenditure of time and resources that are the trademark of piecemeal litigation, as the matter under review aptly illustrates.[11]

We acknowledge that a trial court "has broad case management discretion." Lech v. State Farm Ins. Co., 335 N.J. Super. 254, 260 (App. Div. 2000). To that end, Rule 4:38-2(a) instructs that "[t]he court, for the convenience of the parties or to avoid prejudice, may order a separate trial of any claim, cross-claim, counterclaim, third-party claim, or separate issue, or of any number of claims, cross-claims, counterclaims, third-party claims, or issues." Decisions about whether to sever under Rule 4:38-2(a) are within "the

[11] The untimely application for sanctions in this case resulted in the parties and the trial court unnecessarily expending substantial time and resources on additional motions and court proceedings; meanwhile, this court was required to address two appeals, both with an extensive record and briefing, rather than one appeal.

sound exercise of a trial court's discretion." Rendine v. Pantzer, 141 N.J. 292, 310 (1995).

Here, the trial court did not enter an order under Rule 4:38-2(a) at the conclusion of the trial. Merely discussing the fact that the court would address sanctions separately in another hearing is not the same as ordering severance under Rule 4:38-2(a). The court's decision to wait until the appeal was completed, because only then would plaintiff's claim be "completely untenable," was misguided. As noted, plaintiff's appeal did not concern whether the initial complaint was frivolous when filed. It addressed only whether the trial court appropriately dismissed the complaint based on plaintiff's failure to overcome the presumption. There is simply no procedure in place for the trial court's assertion that it needed to wait until this court issued its opinion in Wolosky I before addressing the issue of sanctions, or that it could do so without an order bifurcating the issues.

We are also persuaded to vacate the award of counsel fees and costs in this case because the CIS filed with this court in Wolosky I on behalf of the Holensteins represented that there were no remaining claims against any party, including any "applications for counsel fees." Indeed, the CIS filed by counsel for the Holensteins answered the following question in the negative: "Are there any claims against any party below, either in this or a consolidated action, which

have not been disposed of, including counterclaims, cross-claims, third-party claims and applications for counsel fees?"

Based on their CIS, we find that the Holensteins waived any claim for frivolous litigation sanctions and counsel fees. To now claim reliance on the court's "conscious and rational decision to toll the filing date for the motion, as he explained in his April 17, 2019, letter amplifying the court's bench decision on the matter" is insufficient to cure the procedural defects in this matter. Defendants took no action to preserve their right to seek sanctions until well after the deadline to make such a filing had passed.

The applicable rule and statute are clear. A motion for sanctions shall be filed with the court no later than twenty days following the entry of final judgment. R. 1:4-8(b)(2). Under N.J.S.A. 2A:15-59.1, a finding must be made by the judge "during the proceedings or upon judgment that a complaint . . . of the nonprevailing person was frivolous." N.J.S.A. 2A:15-59.1(a)(1).

We acknowledge that in Gooch we relaxed the twenty-day time requirement where the motion for sanctions was made twenty-six days past the twenty-day filing deadline. 355 N.J. Super. at 19. In contrast, the relaxation of the filing deadline here allowed a motion for sanctions which was 659 days late. While the rule may be relaxed in limited circumstance, we conclude the trial court mistakenly exercised its discretion by relaxing the time period to file by

nearly two years. We are also mindful that, at the conclusion of the trial, the court emphasized that the parties should "[l]ook at the rules that pertain to frivolous suits, to be sure that we comply with those."

III.

Plaintiff argues that the trial court erred in not awarding him counsel fees against Fredon Township, which filed a motion for sanctions without first serving a safe harbor letter. Because Fredon failed to comply with the "'strict' requirements of Rule 1:4-8 and the frivolous litigation statue," plaintiff contends he was entitled to counsel fees in opposing the motion.

Plaintiff raised the issue of counsel fees against Fredon Township when it filed a motion for reconsideration. The court did not find Fredon Township's motion for fees to be frivolous because there had been "a finding that it was a frivolous suit." Nevertheless, the court declined to award Fredon Township fees because there "was a procedural defect" and without that, plaintiff "would be facing additional sanctions here."

As noted, a trial court may determine an action was frivolous if the claim "was commenced, used or continued in bad faith" or "[t]he nonprevailing 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[.]" N.J.S.A 2A:15-59.1(b)(1)-(2).

The trial court found that the motion filed by Fredon Township was not frivolous but was more akin to a good faith mistake. We discern no basis to reject the court's assessment of Fredon Township's filing of a motion for sanctions, without first serving a safe harbor letter, as a good faith mistake. We therefore conclude the denial of plaintiff's motion for counsel fees was not an abuse of discretion.

Vacated, in part, and affirmed, in part.